Sundays and statutory holidays) — "shall be entitled to double his ordinary rate of pay...." which is a mere repetition of the words of the Ordinance.

Considerable importance was attached by the appellant to the recommendation of the Court of Inquiry into the dispute between the Singapore Traction Company Limited and its employees which reads as follows:—

"30. We recommend that work on any of the days specified in Schedule A to the Labour Ordinance should be paid for at double the ordinary rate of wages as provided in the Labour Ordinance, and we reject the Union's claim for double pay in addition to the wages paid in respect of the holiday."

This was not a judicial pronouncement on the construction of a particular provision in the Labour Ordinance but merely a recommendation by a Court of Inquiry which may have been influenced by various factors and we are unable to derive any assistance from it. I do not know whether the Court of Inquiry had the benefit which this Court has had of an exhaustive and critical examination of the relevant provisions of the legislation in question. If it was intended to be an authoritative statement as to the correct construction to be placed upon the section I have the misfortune, with the greatest respect, to disagree with it.

I think, perhaps, I should add that the appellant company has very properly brought this appeal in order to obtain a decision on what, in the circumstances of this case, is the correct amount to be paid and with no wish to evade legal liability.

For the reasons which I have already indicated the appeal fails and must be dismissed with costs.

Chua and **Kulasekaram JJ.** concurred.

Appeal dismissed.

Solicitors: *Braddell Bros.*; *David Marshall.*

PUBLIC PROSECUTOR v. SOO YOKE TECK

[A.Cr.J. (Ong J.) October 30, 1963]

[K.L. — Criminal Appeal No. 56 of 1963]

Road Traffic Ordinance, 1958, ss.120(2) and 138(3) —Overloading—Liability of servant—Punishment as deterrent.

Criminal Procedure—"Cautioned and discharged" —Criminal Procedure Code (Cap. 6), s.173A(ii)(a).

This was an appeal by the Public Prosecutor against an order by a magistrate under section 173A(ii)(a) of the Criminal Procedure Code against a lorry driver who had pleaded guilty to an offence under section 120(2) of the Road Traffic Ordinance. The learned magistrate had stated as his reason for proceeding under section 173A (ii)(a) that the vehicle owner had already been fined.

Held: by virtue of section 138(3) of the Road Traffic Ordinance the respondent as driver was liable to punishment no less than the owner of the vehicle though it did not follow that the punishment should be of the same severity as that imposed on the owner. The punishment must be sufficient to act as a deterrent.

Order of the learned magistrate set aside and a fine of $100 imposed in lieu thereof.

CRIMINAL APPEAL.

Hamzah bin Salleh (Deputy Public Prosecutor) for the appellant.

Lall Singh Muker for the respondent.

Ong J.: This is an appeal by the Public Prosecutor against an order by a Kuala Lumpur magistrate who had convicted the respondent lorry driver on his plea of guilty to an offence under section 120(2) of the Road Traffic Ordinance 1958 of overloading his vehicle with an excess weight of nearly 8 tons. In purported compliance with section 173A of the Criminal Procedure Code the learned magistrate "cautioned and discharged" the respondent. The Public Prosecutor appeals against the inadequacy of the sentence.

The learned magistrate in his grounds of judgment, states that he had made his order under section 173A(ii)(a) because the vehicle owner had already been fined. I am informed by the learned Deputy Public Prosecutor that the fine imposed on the owner had been $100, (which was manifestly inadequate) but it had been increased on appeal to $400.

The overloading which was considerable was clearly deliberate. The respondent as a servant was liable to punishment, no less than his employer, by virtue of section 138(3) of the Road Traffic Ordinance, 1958. It does not follow, however, that he ought to be fined the same amount as the vehicle owner. Allowing him to get off scot-free would be wrong in principle because he is not deterred from repeating the offence in future. Since the profit goes into the employer's pocket the vehicle owner must bear the brunt. In the circumstances, I think the proper sentence on the respondent should be a fine of $100 which should serve as a sufficient deterrent for a wage-earner. In case the vehicle owner should indemnify him, it is sufficient that this person had already paid a substantial fine as owner. I accordingly quash the order of the magistrate and in lieu thereof sentence the respondent to pay a fine of $100.

Order accordingly.

Solicitors: *Lovelace & Hastings.*

RE LIM YEW SIANG

[R.Cr.J. (Gill J.) November 11, 1963]

[K.L. — Criminal Revision No. 9 of 1963]

Criminal Procedure—Failure to appear on summons —Issue of warrant for arrest—Appearance on own volition—Magistrate dealing with charges in absence of prosecuting officer—Criminal Procedure Code (Cap.6), s.137.

The defendant was charged with failing to pay contributions under the Employees' Provident Fund Ordinance, 1951, and a warrant of arrest was issued against

him. Before the warrant was executed the defendant appeared in court and the magistrate proceeded to deal with the charges against the defendant in the absence of a prosecuting officer. The defendant pleaded guilty and a fine was imposed. On revision,

Held: the magistrate should not have proceeded with the case in the absence of a prosecuting officer and section 137 of the Criminal Procedure Code does not entitle a magistrate in these circumstances to proceed with the case.

CRIMINAL REVISION.

Salleh bin Abbas (Deputy Public Prosecutor) for the Public Prosecutor.

Yong Pung-How for Lim Yew Siang.

Gill J.: This case was brought to my knowledge by the Public Prosecutor, and I decided to deal with it in revision because it was clear from what transpired in the Magistrate's Court that the matter could not be brought up before this court in the normal way of an appeal within the prescribed period. In any event the party to be affected by the order which I proposed to make in the circumstances of the case was given an opportunity to be heard and was indeed represented by an advocate.

The defendant was charged in the Magistrate's Court, Kuala Lumpur with failing to pay contributions to the Employees' Provident Fund under sections 7 and 8 of the Employees' Provident Fund Ordinance, 1951 and as required by regulation 3 of the Employees' Provident Fund Regulations, 1962, thereby committing an offence under section 16A(1)(c). The proceedings against him were commenced by way of a summons which was issued on 1st June, 1963 and made returnable on 24th June, 1963. The summons was served on the defendant on 11th March, 1963, but he failed to appear in court on the appointed day, whereupon the court issued a warrant for his arrest and fixed the case for mention on 22nd July, 1963. On 22nd July, 1963 the prosecuting officer was informed by the court interpreter that the case was postponed to 19th August, 1963. When the prosecuting officer appeared in court on 19th August, 1963 he was informed by the court interpreter that the case had been dealt with on 9th August, 1963.

It would appear that the warrant issued for the arrest of the defendant was never executed. The defendant appeared in court of his own volition on 9th August, 1963, whereupon the magistrate cancelled the warrant of arrest and proceeded to deal with the case in the absence of a prosecuting officer. The defendant pleaded guilty to the charge and he was convicted on his own plea and sentenced to a fine of $20. He was also ordered to pay $40 to the Employees' Provident Fund.

What the magistrate did was highly irregular, if not illegal. There was nothing wrong about the defendant appearing in court on 9th August, 1963 so as to avoid the indignity of being arrested and produced in court, but the magistrate should not have proceeded to deal with the case without reference to the prosecuting officer. If there was no prosecuting officer then present in court, he should have stood the case down until a prosecuting officer was present to give him the facts of the case without which it is not possible for a court to assess the appropriate sentence. Presumably the magistrate purported to act under section 137 of the Criminal Procedure Code but that section does not entitle the court to deal with the case in the absence of somebody to represent the Public Prosecutor. In the circumstances I set aside the order of conviction and sentence and left it open to the appropriate authority to take out a fresh summons against the defendant.

Order of conviction and sentence set aside.

Solicitors: *Shook Lin & Bok.*

RE ENG CHONG LAM

[R.Cr.J. (Gill J.) November 11, 1963]

[K.L. — Criminal Revision No. 10 of 1963]

Criminal Procedure—Sentence—Need for deterrent sentence—Conviction not recorded—Criminal Procedure Code (Cap. 6), ss.173A and 294.

Penal Code, s.384—Extortion—Observations on.

On the accused pleading guilty to a charge under section 384 of the Penal Code the learned magistrate accepting existence of mitigating circumstances and acting under section 294 of the Criminal Procedure Code (Cap. 6) bound the accused over in the sum of $1,000 with one surety for a period of two years. On revision,

Held: section 294 of the Criminal Procedure Code can only be used where the conviction is for an offence punishable with imprisonment without the option of a fine and is inapplicable to a conviction under section 384 of the Penal Code. In the circumstances of this case, the order should have been made under section 173A of the Criminal Procedure Code.

Case referred to:—

(1) *Public Prosecutor* v. *Idris* [1955] M.L.J. 234.

CRIMINAL REVISION.

Salleh bin Abbas (Deputy Public Prosecutor) for the Public Prosecutor.

Accused in person.

Gill J.: This case has been referred to me by the magistrate who dealt with it for the purpose of revising the order which he made at the conclusion of the case.

The accused Eng Chong Lam was charged under section 384 of the Penal Code for extorting $30 from one Tan Peh, to which charge he pleaded guilty. The learned magistrate, taking into consideration certain mitigating circumstances, bound over the accused under section 294 of the Criminal Procedure Code in the sum of $1,000 with one surety for a period of two years.

In making the order for binding over, the